Supreme Court, U.S.
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CASE NO. OFFICE OF THE CLERK

In The

UNITED STATES SUPREME COURT

October Term, 1996

VANCE C. MILLER,
Petitioner,

vs.

STONEHEDGE/FASA-TEXAS JDC, LIMITED PARTNERSHIP
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Does 12 U.S.C. §1821(d)(14) preempt the state law limitation period for the filing of a deficiency action following a state law non-judicial foreclosure sale, where the foreclosure was conducted by the Resolution Trust Corporation itself?

2. Does cancellation and extinguishment of a primary obligation by novation in a Chapter 11 bankruptcy plan cancel and extinguish a guaranty obligation?

LIST OF ALL PARTIES TO PROCEEDING

1. Resolution Trust Corporation.

2. Stonehenge/FASA-Texas JDC, Limited Partnership.

3. Vance C. Miller.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. LIST OF PARTIES TO PROCEEDING ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES iv

V. INDEX TO APPENDICES vii

VI. OPINIONS BELOW 2

VII. JURISDICTION 2

VIII. STATUTORY PROVISIONS 2

IX. STATEMENT OF THE CASE 3

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below 3

B. Statement of the Facts 3

IX. REASONS FOR GRANTING THE WRIT 7

A. The Foreclosure Issue 7

B. The Novation Issue 16

X. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Caples v. Port Huron Engine & Thresher Co., 131 S.W. 303
(Tex. Civ. App., 1910, writ ref'd) 17

City of Boerne v. Flores, 1997 U.S. LEXIS 4035 (June 25, 1997) 11

Commercial Nat. Bank v. Poulos, 8 S.W.2d 222
(Tex. Civ. App. 1928) 17

Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 423 S.W.2d 645
(Tex. Civ. App. - Houston [14th Dist.], 1967] 17

Davidson v. FDIC, 821 F. Supp. 1176
(W.D. Tex. 1993), aff'd, 44 F.3d 246, 250 (5th Cir. 1994), 25
reh'g denied, 1995 U.S. App. LEXIS 3467 10

In re East Texas Steel Facilities, Inc., 117 B.R. 235
(Bankr. N.D.Tex. 1990) 18

Fidelity Federal Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141
(1982) 10

Greig v. First Nat'l Bank, 511 S.W.2d 86, 88
(Tex. Civ. App. - Beaumont 1974, writ ref'd n.r.e.), ... 18

Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014,
1035 (5th Cir. 1990) 20

Holland v. First Natl. Bank In Dallas, 597 S.W.2d 406
(Tex. Civ. App. - Dallas, 1980, reh'g denied) 18

Hughes v. Prewitt, 5 Tex. 264 (1849) 17

Hunt v. Bankers Trust Co., 689 F. Supp. 666 (N.D. Tex. 1987) . 17

International Paper Co. v. Whitson, 595 F.2d 559
(10th Cir. 1979) 14

Moore v. Grain Dealers Mutual Ins. Co., 450 S.W.2d 954, 957
(Tex. Civ. App. - Houston (1st Dist.), 1970) 17

Pierce v. Randolph, 12 Tex. 290 (1894) 17

Printz v. United States, 1997 U.S. LEXIS 4044 (June 27, 1997) . 11

RTC v. Olson, 768 F.Supp. 283, 285 (D. Ariz. 1991) 14,15

Reconstruction Finance Corp. v. Breeding, 211 R.2d 385
(10th Cir. 1954) 14

Strain v. Pauley Jail Bldg. & Manuf'g Co., 80 Tex. 622,
16 S.W. 625 (1891) 17

Thompson v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25
(Tex. Civ. App. - Dallas 1992). 17

In re 360 Inns, Ltd., 76 B.R. 573, 578
(Bankr. N.D. Tex. 1987) 16

Trinity River Authority v. URS Consultants, Inc., 889 S.W.2d 259
(Tex. 1994) 13,15

Utah v. Urbish, 433 S.W.2d 905
(Tex. Civ. App. - Dallas, 1968, error ref'd) 17

STATUTES

11 U.S.C. § 524(a). 19

11 U.S.C. § 524(e) 19

12 U.S.C. § 1821(d)(14) 7,8,9,12,14,15

Texas Property Code, § 51.003 7,12,13,15

Texas Property Code, § 51.003(a) 11,13

TEX. CIV, PRAC, & REM. CODE § 16.008 13

OTHER AUTHORITIES

138 CONG. REC. S 3124, 102nd Cong. (March 10, 1992) 9

INDEX TO APPENDICES

Appendix A Orders entered by the Fifth Circuit Court of Appeals

Appendix B District Court's Memorandum of Decision

Appendix C Statutes

CASE NO. _____

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October Term, 1996

VANCE C. MILLER,

Petitioner,

vs.

STONEHEDGE/FASA-TEXAS JDC, Limited Partnership,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Vance C. Miller, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders entered by the and Court of Appeals are attached as Appendix A to this petition. The district court's memorandum of decision appear as Appendix B.

JURISDICTION

This proceeding was commenced by filing of a Complaint by the RTC in the United States District Court for the Northern District of Texas, Dallas Division. The district court entered Judgment against Petitioner on November 16, 1995. An appeal to the district court Judgment was timely filed by the Petitioner with the Fifth Circuit Court of Appeals. On March 10, 1997, the Fifth Circuit affirmed the Judgment of the district court with modifications. A petition for rehearing was timely filed by the Petitioner, and was denied by the Fifth Circuit Court of Appeals on April 17, 1997. This Court may review the Court of Appeals' decision by writ of certiorari. *28 U.S.C. § 1254.*

STATUTORY PROVISIONS INVOLVED[1]

11 U.S.C. §§ 524(a), 524(e), 1141(a), 12 U.S.C. § 1821(d)(14), Texas Property Code §§ 51.003, 51.003(a), Texas Civil Practice and Remedies Code §§ 16.008.

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[1] Copies of Statutes are set forth in Appendix C filed herein pursuant to Rule 14.1(k) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below.

On March 10, 1997, the United States Court of Appeals for the Fifth Circuit[2] filed its Opinion and Order modifying and affirming a Judgment by the U.S. District Court, Northern District of Texas,[3] in favor of the Resolution Trust Corporation as Receiver for various failed savings institutions[4] in the amount of in excess of $20,000,000. A Petition for Rehearing was timely filed by Vance C. Miller ("Miller" or "Petitioner"), Petitioner herein, which was denied by the Fifth Circuit Court of Appeals on April 17, 1997.

B. Statement of the Facts.

FACTS RELATING TO THE FORECLOSURE ISSUE

Real property securing the VCMS Notes, which were guarantied by the Petitioner, was foreclosed upon by the RTC on April 2, 1991.

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2 The panel consisted of Judges Politz, Reavley and Dennis.

3 The Honorable A. Joe Fish, District Judge.

4 Stonehenge/FASA TX, et. al., substituted as Plaintiff herein on March 14, 1996.

The RTC's Complaint initiating the lawsuit for the deficiency in the district court was filed by the RTC on May 17, 1994, more than two years after the foreclosure sale.

FACTS RELATING TO THE NOVATION ISSUE

On or about June 13, 1989, Prestonwood Golf Club, Inc. ("PGC"), executed and delivered to predecessors in interest of the RTC five Promissory Notes that constituted the Prestonwood Loans (the "Prestonwood Notes"). Miller executed a series of five Continuing Guaranty Agreements, wherein he guaranteed the indebtedness evidenced by the Prestonwood Notes.

On February 5, 1992, PGC filed a petition under Chapter 11 of the Bankruptcy Code, and on April 9, 1992, the presiding bankruptcy court entered an order confirming PGC's First Modified Plan of Reorganization (the "Bankruptcy Plan"). The Bankruptcy Plan provided that the "Plan shall constitute a novation of any debt of whatever character against the Debtor..." The Bankruptcy Plan specifically modified and restructured the indebtedness owed by PGC to the RTC, as evidenced by the Prestonwood Notes. A hearing was held by the bankruptcy court to consider confirmation of the Bankruptcy Plan.

At the hearing on confirmation of the Bankruptcy Plan, the RTC agreed to the entry of an Order Confirming the Bankruptcy Plan. As a result of the agreement reached by PGC and the RTC regarding confirmation of the Bankruptcy Plan, an Order Confirming Plan was entered by the bankruptcy court confirming the Bankruptcy Plan.

Following confirmation of the Bankruptcy Plan, a new loan documents were executed by the parties, specifically providing that such documents were "given in novation and extinguishment of the obligations of PGC, Inc., a Texas non-profit corporation ("Debtor") to the RTC, including and without limitation, the following:..." In the five paragraphs that followed, each of the five Prestonwood Notes was specifically identified. These five Prestonwood Notes constitute all five of the promissory notes that were the basis of the Prestonwood Claim of the RTC in the Complaint.

Prior to execution of the New Promissory Note, PGC and Miller, in order to insure RTC acceptance of and compliance with the terms of the New Promissory Note prior to funding of $667,729.45 and another $250,000.00 in cash, for a total of $917,729.45 in cash, and delivery of the New Promissory Note, Deed of Trust and other

instruments, requested written affirmation from the RTC as to acceptance of the terms of the New Promissory Note, including the language regarding novation and extinguishment of the pre-existing debt, as a precondition to execution of the documents and wire transfer of the cash payments. On June 8, 1992, an attorney for the RTC sent a letter to attorney for PGC (the "June 8 Letter"), stating that "[m]y client [the RTC] and I have reviewed [New Promissory Note and other documents] and found all five documents to be acceptable in their present form. The "present form" of the New Promissory Note, as referred to in the June 8 Letter was the final version of the New Promissory Note executed by Miller on behalf of PGC.

Based upon the acceptance by the RTC of the New Promissory Note, new loan documents, including the New Promissory Note, a Deed of Trust and other documents, were executed and delivered to the RTC. Additionally, a cash payment in the amount of $917,729.45 was raised by Miller from outside sources, and was paid to the RTC.

On June 17, 1992, attorney for the RTC acknowledged receipt by the RTC of the New Promissory Note and the cash payment in the amount of $917,729.45.

REASONS FOR GRANTING THE WRIT

A. THE FORECLOSURE ISSUE

1) THE COURT OF APPEALS' RULING THAT FIRREA'S EXTENDED STATUTE OF LIMITATIONS PREEMPTS LIMITATIONS PROVISIONS CONTAINED IN STATE FORECLOSURE LAWS IS A SIGNIFICANT DEPARTURE FROM WELL ESTABLISHED PRECEDENT OF THIS COURT.

The foreclosure sale resulting in alleged deficiencies relating to the VCMS Claims was conducted by the RTC after the effective date of section 51.003 of the Texas Property Code, which provides, in relevant part, that "any action brought to recover the deficiency must be brought with two years of the foreclosure sale and is governed by this section." TEX. PROP. CODE § 51.003. The Complaint resulting in the Judgment upheld by the Fifth Circuit Court of Appeals was filed by the RTC more than two years after the foreclosure sale. The Fifth Circuit Court of Appeals upheld the Judgment of the federal district court, holding that 12 U.S.C. § 1821(d)(14), providing an extended statute of limitations for the RTC under FIRREA, preempted the state law limitation period.

The decision the Fifth Circuit Court of Appeals in this case

represents a significant departure from well established law of this Court relating to federal preemption of state laws. This Court has held that preemption of a state law is appropriate only to the extent that state law actually conflicts with federal law.

> Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Jones v. Rath Packing Co., 430 U.S., at 526; Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 773 (1947).

Fidelity Federal Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141 (1982). Under the present statutory scheme and facts, compliance with both state and federal law was not impossible, nor does state law stand as an obstacle to objectives of Congress.

The policy considerations underlying the intention of Congress to grant the FDIC and RTC an enhanced period of time to bring actions do not exist under the present facts because the RTC itself conducted the foreclosure sale. The purpose for enactment of section 1821(d)(14) was to prevent the federal government, when taking over a failed institution, from being surprised or "bitten" by a statute of limitations

that it may not know about and that may not be readily ascertained from the failed institution's "cold" files. After a bank closure, often there is a total displacement of personnel that adds to the confusion and other unknowns. This policy is evident from the following statements made by Senator Wirth in introducing 12 U.S.C. § 1821(d)(14) to Congress:

> We need to provide adequate time for regulators to file suits. Very often, these are complex cases; it takes a great deal of time for regulators to work their way through the tangled books and records of a failed institution and determine if there is reason to sue any party associated with the failure.

138 CONG. REC. S 3124, 102nd Cong. (March 10, 1992)(emphasis supplied).

However, where the RTC itself conducts the foreclosure sale, the policy-oriented rationale described by Senator Wirth does not exist to protect RTC from well-known and well-established substantive time limitations contained in the Texas foreclosure statutes. This is not a situation where the RTC inherited a lawsuit whose time was running out. Instead, the deficiency action brought by the RTC was, in effect, created by the foreclosure sale that RTC itself conducted. As this Court stated in the de la Cuesta case, a conflict, resulting in preemption, arises only when the state law stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress. de la Cuesta, 458 U.S. 141. Under the present facts, because the RTC conducted the foreclosure sale the RTC did not inherit a set of " tangled files", and along with them, the need for an extended period of time with which to bring a lawsuit. Because Congressional intent does not support extension of the statute of limitations to a situation where the RTC conducted a foreclosure sale itself under the same laws that created both the deficiency action and the time deadline for the bringing of such a cause of action, there can be no preemption.

In Davidson v. FDIC, 44 F.3d 246, 250 (5th Cir. 1995), reh'g denied, 1995 U.S. App. LEXIS 3467, the Fifth Circuit Court stated:

> [F]ederal common law rules should displace state laws only in the case of a significant conflict with specific or unique federal interests. Here, the displacement of state law in favor of federal common law presupposes the existence of a significant federal proprietary interest in conflict with state law. Absent such an interest or some express congressional policy to the contrary, state law governs state-law rights held by the FDIC in its limited capacity as the receiver of a nonfederal entity.

Davidson v. FDIC, 44 F.3d 246, 250 (5th Cir. 1995), reh'g denied, 1995 U.S. App. LEXIS 3467. Again, rulings of the Fifth Circuit itself show the restraint that should be exercised by federal courts in

displacing the rights of states to enjoy enactment and validity of their own laws.[5]

Further, since the RTC itself conducted the foreclosure sale, the RTC availed itself of the benefits of the streamlined non-judicial foreclosure laws available in Texas to gain ownership of the real property securing the VCMS Loans. These foreclosure laws also require a deficiency lawsuit to be brought in two years, a relatively simple task to perform. Since the RTC has availed itself of the benefits of the foreclosure laws, the RTC must also be bound by the burdens of the same laws. Further support for this argument is found in section 51.003(a) itself, which states that the bringing of a deficiency action "is governed by this section."

In the present case, the RTC waited more than two years after foreclosure of the real property securing the VCMS Loans to bring the deficiency action against Miller. The RTC itself conducted the foreclosure relying on the streamlined non-judicial foreclosure laws of

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5 See also the recent rulings of this Court upholding state rights in the face of federal statutes in Printz v. United States, 1997 U.S. LEXIS 4044 (June 27, 1997); City of Boerne v. Flores, 1997 U.S. LEXIS 4035 (June 25, 1997).

the State of Texas. The RTC is likewise bound by the burdens of the process it used. This process gives substantive legal rights to affected parties that could easily have been followed by the RTC. The RTC, having consciously chosen to wait three years to sue, in violation of the Texas anti-deficiency statute, is barred by extinguishment under section 51.003 of the Texas Property Code.

2) THE DECISION OF THE FIFTH CIRCUIT THAT FEDERAL LAW PREEMPTS STATE "SUBSTANTIVE" LIMITATIONS PERIODS CONFLICTS WITH A DECISION OF THE TENTH CIRCUIT COURT OF APPEALS.

Certain federal statutes, such as 12 U.S.C. § 1821(d)(14), operate to enhance certain procedurally oriented state law statutes of limitations. However, section 51.003 of the Texas Property Code is not a procedural statute of limitations subject to federal enhancement. Instead, section 51.003 is a substantive legal provision that is binding on the RTC, the entity that conducted the foreclosure sale. The Fifth Circuit held that "preemption does not turn on whether the state statute is 'procedural' or 'substantive.'" Memorandum Opinion at p.6.

This decision is in contradiction of case law from the Tenth Circuit Court of Appeals, as well as other lower courts, recognizing that

substantive statutes of extinguishment or repose, such as section 51.003(a), are not subject to enhancement under federal law. Unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action. Trinity River Authority v. URS Consultants, Inc., 889 S.W.2d 259 (Tex. 1994). The most often quoted statute of repose is section 16.008 of the Texas Civil Practice and Remedies Code, which provides that a suit must be brought "not later than 10 years after the substantial completion" of certain improvements. TEX. CIV. PRAC. & REM. CODE § 16.008. Section 16.008 does not run from the date of the accrual of a cause of action.

Like section 16.008 of the Civil Practice and Remedy Code, section 51.003 of the Texas Property Code does not run from the date that the cause of action accrues. Instead, the statute runs from a specific date, i.e., the date of the foreclosure sale. Section 51.003 is, therefore, a statute of repose under Texas Law.

In the Trinity River Authority case, the Texas Supreme Court stated that a statute of repose is a substantive definition of, rather than a procedural limitation on, rights. See also, Lamb v. Wedgewood South

Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The Tenth Circuit Court of Appeals, interpreting the Oklahoma anti-deficiency statute, ruled that substantive time limitations are not preempted by federal law. In International Paper Co. v. Whitson, 595 F.2d 559 (10th Cir. 1979), the Court held that an Oklahoma statute requiring a party foreclosing on property to move for deficiency judgment within 90 days of foreclosure was binding on the federal government. The Oklahoma statute, which has the same thrust as the Texas Property Code statute, was held to not be a statute of limitations. Instead, the court found the statute to be binding on the federal government as a statute of extinguishment. See also, Reconstruction Finance Corp. v. Breeding, 211 R.2d 385 (10th Cir. 1954).

Another federal case squarely on point as to whether the RTC is bound by the substantive time limitations of a state foreclosure law, notwithstanding 12 U.S.C. § 1821(d)(14) is RTC v. Olson, 768 F.Supp. 283 (D. Ariz. 1991). In Olson, the defendants argued that the RTC's deficiency action was barred by the Arizona foreclosure deficiency statute, which requires an action to be brought within three months of foreclosure. The thrust of the Arizona statute is identical to section

51.003 of the Texas Property Code, except that the action must be brought within three months, as opposed to two years. In Olson, the RTC contended that it was not bound by the Arizona statute, arguing that the federal government is not bound by state statutes of limitations. Like the Texas Supreme Court in Trinity River Authority, the Arizona District Court in Olson distinguished a statute of limitations from a statute of repose. "A statute of limitations is procedural in nature while a statute of repose is substantive in that it defines a right rather than merely limits its enforcement." Id. at 285. Once the time elapses, the right of action is extinguished and gone forever. Id. The RTC argued that it was saved by 12 U.S.C. § 1821(d)(14). The court disagreed:

> [T]he federal statute relied upon by the RTC in support of this argument, 12 U.S.C. § 1821(d)(14) and the cases relied upon by the RTC deal only with procedural statutes of limitations and not substantive statutes of repose. Substantive time limits, as opposed to procedural statutes of limitation, are binding on the federal government.

Id.

B. THE NOVATION ISSUE

1) THE DECISION OF THE FIFTH CIRCUIT THAT THE GUARANTOR'S OBLIGATIONS WERE NOT "DISCHARGED" UNDER FEDERAL BANKRUPTCY LAW CONFLICTS WITH STATE LAW PROVIDING FOR EXTINGUISHMENT OF A DEBT AS A RESULT OF NOVATION.

Under the present facts, there is no question that the Bankruptcy Plan, together with the new loan documents executed following confirmation of the Bankruptcy Plan, constituted a novation under Texas law. A consensual bankruptcy plan, confirmed with the agreement of the parties, operates as a contract between the parties thereto, the clear and unambiguous terms of which cannot be subsequently altered by parole evidence. In re 360 Inns, Ltd., 76 B.R. 573, 578 (Bankr. N.D. Tex. 1987) ("an agreed order is in the nature of a contract and is subject to the rules of construction of contracts"). Because the RTC agreed that confirmation of the Bankruptcy Plan would constitute a novation, they were contractually bound to that fact as a matter of law.

The legal effect of a novation under Texas law is an extinguishment of the old obligations and a replacement of a new

obligation. Utah v. Urbish, 433 S.W.2d 905 (Tex. Civ. App. - Dallas, 1968, error ref'd); Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 423 S.W.2d 645 (Tex. Civ. App. - Houston [14th Dist.], 1967); Hunt v. Bankers Trust Co., 689 F. Supp. 666 (N.D. Tex. 1987) ("If the [new] Agreement is valid and enforceable, then it may have been an effective novation and the pre-existing contracts will have been extinguished"). In the event that there has been a novation, the holder of the obligation may not sue on the old obligation. Thompson v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25 (Tex. Civ. App. - Dallas 1992). Likewise, courts have held that where a novation has been effectuated, the original agreement is at an end, cannot form the basis of an enforceable claim, and no recovery may be had on it. Pierce v. Randolph, 12 Tex. 290 (1894); Strain v. Pauley Jail Bldg. & Manuf'g Co., 80 Tex. 622, 16 S.W. 625 (1891); Hughes v. Prewitt, 5 Tex. 264 (1849); Commercial Nat. Bank v. Poulos, 8 S.W.2d 222 (Tex. Civ. App. 1928); Caples v. Port Huron Engine & Thresher Co., 131 S.W. 303 (Tex. Civ. App., 1910, writ ref'd).

A valid guaranty requires the existence of a primary obligation. Moore v. Grain Dealers Mutual Ins. Co., 450 S.W.2d 954, 957 (Tex.

Civ. App. - Houston (1st Dist.), 1970)("For there to be a guarantor there must be a primary obligation on the part of another the performance of which is guaranteed."); In re East Texas Steel Facilities, Inc., 117 B.R. 235 (Bankr. N.D.Tex. 1990)(Under Texas law, obligation of guarantor depends on existence of primary obligation on part of guarantor's principal to principal's creditor). In Holland v. First Natl. Bank In Dallas, 597 S.W.2d 406 (Tex. Civ. App. - Dallas, 1980, reh'g denied), the court held that a bank has no cause of action against the guarantor apart from the indebtedness of the borrower. Likewise, in Greig v. First Nat'l Bank, 511 S.W.2d 86 (Tex. Civ. App. - Beaumont 1974, writ ref'd n.r.e.), a guarantor executed a continuing guaranty, agreeing that "all extensions of credit and financial accommodations concurrently herewith or hereafter made by Bank to Borrower shall be conclusively presumed to have been made in acceptance hereof." When a new primary obligation was executed, the court held that any cause of action against both the primary obligor and the guarantor on the old obligation "was extinguished as a new note was executed and the old note thereby paid." Id. at 88. Because the Prestonwood Loans were extinguished and canceled, any guaranties of Miller based on the

Prestonwood Loans were likewise extinguished and canceled.

The Fifth Circuit, rather than focusing on the effect of a contractual extinguishment of a primary obligation on the liability of the guarantor under Texas law, incorrectly focused on the effect of a statutory discharge in bankruptcy of the primary obligor on the obligation of the guarantor. Petitioner concedes that a statutory discharge has no effect on the liability of a non-bankrupt guarantor of the discharged indebtedness. The effect of a statutory bankruptcy discharge is clear. Section 524(a) of the Bankruptcy Code provides that a discharge does not, in and of itself, extinguish a debt. Instead, the discharge operates to keep the debt alive, but provides for an injunction as to its collection against the bankrupt debtor. See 11 U.S.C. § 524(a). It therefore follows that the discharge will not extinguish the liability of any other entity on the discharged debt, and the Bankruptcy Code does not provide for a like injunction inuring to the benefit of a guarantor. To make this concept crystal clear, Section 524(e) provides that the liability of any other entity on the indebtedness of the bankrupt principal obligor is not effected by the discharge.

However, Petitioner never attempted rely on the effect of the

Bankruptcy Code's discharge. Cases cited in the Fifth Circuits' Memorandum Opinion deal with the limit on the effect of a statutory bankruptcy discharge on the obligation of a non-debtor guarantor. The Fifth Circuit incorrectly denied the guarantor the effect of Texas law canceling and extinguishing the debt substituted by novation by applying law relating to the effect of a federal bankruptcy discharge.

As to the guarantor, the liability relating to the Prestonwood Loans cannot, and did not, survive the extinguishment of the underlying notes themselves. "A novation contract usurps a pre-existing contract's legal effect." Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1035 (5th Cir. 1990). It is axiomatic that a guaranty cannot exist without the existence of a principal obligation. The effect of an extinguishment of the Prestonwood Loans was to extinguish the obligations that require their existence, i.e., the guaranties.

CONCLUSION

Under the facts of this case, the Fifth Circuit Court of Appeals departed from well established precedent of this Court regarding preemption of state laws by the federal government. The federal policy underlying preemption clearly requires an irreconcilable conflict between

federal law and the state provision which the federal government is attempting to displace. Under the present facts, no such conflict between the provisions exists, as is evident from the intention of Congress in an acting federal legislation under FIRREA.

Further, and as an independent reason for granting the foregoing writ, the Fifth Circuit denied the Petitioner the effect of the Texas law canceling and extinguishing obligations substituted by novation by holding that the indebtedness was not subject to statutory discharge under federal bankruptcy law.

DATED: July 16, 1997.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.96-10037

IN RE: STONEHEDGE/FASA-TEXAS JDC,
LIMITED PARTNERSHIP,

Plaintiff-Appellee,

versus

VANCE C. MILLER,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas
(3:94-CV-912-G)

(Filed Mar. 10, 1997)

Before POLITZ, Chief Judge, REAVLEY and DENNIS, Circuit Judges. REAVLEY, Circuit Judge:

The district court entered judgment against Vance Miller based on his guaranties of the Prestonwood, VCMS, and Parkway North Venture notes. We agree with the district court that Miller is liable on

his guaranties of the Prestonwood and VCMS loans, but disagree that he is liable on the Parkway guaranty. Accordingly we affirm the judgment as modified herein.

A. *The Prestonwood Guaranties*

PGC, Inc. was the borrower on the Prestonwood notes which Miller guaranteed. Miller claims that the PGC bankruptcy plan effected a novation of the Prestonwood loans and thereby extinguished his guaranty obligations.

Miller correctly notes that, pursuant to PGC's bankruptcy plan, the April 30, 1992 note, not guaranteed by Miller, was "given in novation and extinguishment of the obligations of PGC, Inc., a Texas non-profit corporation ('Debtor') to the RTC." The plan likewise provides that it "shall constitute a novation of any debt of whatever character against the Debtor . . . ." Miller also correctly notes that the RTC approved of the plan, and that, as a general proposition, "[f]or there to be a guarantor there must be a primary obligation on the part of another the performance of which is guaranteed."[1]

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[1] *Moore v. Grain Dealers Mut. Ins. Co.*, 450 S.W.2d 954, 959 (Tex. App.– Houston [1st Dist.] 1970, no writ).

A novation requires that the parties intended the new agreement to replace obligations under the old agreement.[2] The district court did not err in concluding that the bankruptcy plan and the new note were not intended to extinguish Miller's obligations on the Prestonwood guaranties. The plan and new note reference a novation as to the debtor, PGC, and do not purport by their terms to release Miller, the guarantor, from his obligations. The guaranties plainly state that the bankruptcy or release of PGC do not extinguish Miller's obligations as guarantor.

PGC, not Miller, was the debtor in the bankruptcy proceeding. Texas and federal bankruptcy law recognize that a discharge in bankruptcy does not extinguish the obligation of the guarantor, unless the plan expressly so provides. The Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt."[3] "It is settled law, both at the federal and state level, that a discharge in bankruptcy does not affect the liability of

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2 *Landrum v. Devenport*, 616 S.W.2d 359, 362 (Tex. App.– Texarkana 1981, no writ).

3 11 U.S.C. § 524(e).

a guarantor."[4] Indeed, "[o]ne of the primary purposes for obtaining a guarantor to a note is to provide an alternative source of repayment in the event that the principal obligor's debt is discharged in bankruptcy."[5]

B. *The VCMS Guaranties*

Miller argues that the RTC waited too long to sue for recovery under the VCMS guaranties. The relevant dates follow. The RTC became receiver for the three original holders of the VCMS notes beginning in July of 1989.[6] On April 2, 1991, the RTC foreclosed on real estate securing the VCMS loans. The RTC brought this suit against Miller on May 6, 1994. Hence, for our purposes, it is undisputed that the RTC sued more than two years after the foreclosure, but less than six years after its appointment as receiver.

Miller argues that the action is barred by the limitations

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4 *Austin Hardwoods, Inc. v. Vanden Berghe*, 917 S.W.2d 320, 324 (Tex.App.--El Paso 1995,, no writ). Accord, *NCNB Texas Nat'l Bank v. Johnson*, 11 F.3d 1260, 1266 (5th Cir. 1994); *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1350-52 (5th Cir. 1989).

5 *R.D.I.C. Indus. Dev. Fund v. Snyder*, 539 F.2d 487, 491 (5th Cir. 1976).

6 This is the date alleged in the RTC complaint and amended complaint. Miller never disputed this date.

provision of Tex. Prop. Code § 51.003(a), which provides that "[i]f the price at which real property is sold at a foreclosure sale . . . is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, an action brought to recover the deficiency must be brought within two years of the foreclosure sale . . . ."

We hold that the Texas statute is preempted by the inconsistent federal statute of limitations set out in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which provides:

> (A) **In General**
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be --
>
> (i) in the case of any contract claim, the longer of
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law . . .
>
> (B) **Determination of the date on which a claim accrues**
> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such paragraph shall be the later of --
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.[7]

We have described this provision as "FIRREA's preemption of

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[7] 12 U.S.C. § 1821(d)(14).

state statutes of limitations."[8] While we have held that the federal statute does not revive state claims that are untimely at the time the RTC or FDIC is appointed receiver, the federal statute rather than the state statute of limitations applies if the state claims were viable at the time the RTC or FDIC is appointed receiver.[9] In our case, Miller makes no argument that the claims on the VCMS guaranties were stale when the RTC was appointed receiver in 1989. Under the federal limitations provision, the RTC had a minimum of six years from this date to bring suit.

Miller argues that the Texas statute on which he relies is a "substantive statute of repose" rather than a "procedural statute of limitations." He cites *Resolution Trust Corp. v. Olson*,[10] where the court held that an Arizona statute similar to the Texas statute was not preempted, because the federal statute does not preempt state "substantive statutes of repose."[11]

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8 *FDIC v. Barton*, 96 F.3d 128, 133 (5th Cir. 1996).

9 *FDIC v. Dawson*, 4 F.3d 1303, 1306-07 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2673 (1994).

10 768 F. Supp. 283 (D. Ariz. 1991).

11 *Id.* at 285.

We find this argument unpersuasive for several reasons. First, as explained above, in our circuit the federal statute applies so long as the claim is not time-barred under state law at the time of appointment of the RTC as receiver. Here the claim was not time-barred under state law on the date of the RTC's appointment. Second, in our view, preemption does not turn on whether the state statute is "procedural" or "substantive." Preemption is a question of congressional intent, and in the case of conflict preemption presented here, depends on whether there is a direct conflict between the federal and state law or the state law interferes with the regulatory scheme established by Congress.[12] There is no question that the state and federal statutes conflict. The federal statute provides specified minimum periods of time (six years in the case of a contract claim) running from the date of the RTC's appointment as receiver, and "allows the RTC to investigate and determine what causes of action it should bring on behalf of a failed institution" during this period.[13] In our case, applying the Texas statute

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12 *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995).

13 *Barton*, 96 F.3d at 133.

would extinguish a claim which the federal statute preserves.

Third, even if there is a distinction between a "statue of limitations" and a "statute of repose," Texas law treats the state statute at issue here as a statute of limitations. The Texas Supreme Court has described a statute of repose as one that "runs from a specified date without regard to accrual of a cause of action," or one that "cuts off a right of action before it accrues."[14] The provision of the Property Code at issue here cannot properly be described in this manner. It sets a time limitation for seeking a deficiency judgment running from the date of foreclosure. Foreclosure, however, cannot occur until the borrower defaults, and the lender's cause of action on a note likewise accrues when the borrower defaults.[15] Hence, the Texas statute does not run prior to, or without regard to, the accrual of the cause of action. A Texas court has agreed with us, holding that the FIRREA limitations provision preempts the state statute because "section 51.003(a) is a

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14 *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994); *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654 n.1 (Tex. 1989).

15 *McLemore v. Pacific Southwest Bank, FSB*, 872 S.W.2d 286, 293 (Tex. App.–Texarkana 1994, writ dism'd by agr.).

statute of limitations, not a statute of repose."[16]

C. *The Parkway North Venture Guaranty*

The district court found that the Parkway Note "has not been paid by the maker thereof," and that Miller was therefore liable on his guaranty of this note. We hold that the court erred in holding Miller liable under his guaranty of this note.

The note has an unusual provision relating to payment. By its terms the note does not mature until June 30, 1999. Interest was due monthly, but only "[t]o the extent that Net Cash Flow (as defined in the Consolidation Agreement) is available [except with respect to minimum payments (as defined in the Consolidation Agreement) which shall be due and payable monthly in the amounts and to the extent set forth in the Consolidation Agreement, regardless of the amount of Net Cash Flow for a particular month.]" As we read the agreement, only certain "minimum payments" as defined in a separate Consolidation Agreement were due from the borrower before the maturity date, unless "Net Cash Flow" as defined in that separate agreement were available to make

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16 *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 468 (Tex. App. — Waco 1995, writ denied).

payments.

The evidence of amounts due on the various guaranties was minimal. The RTC offered the brief testimony of any employee for Summit National Realty, which had an asset management contract with the RTC. The witness had prepared a summary chart of the amounts allegedly due from Miller on his guaranties. With respect to the Parkway North Venture note, the chart indicated that the entire $2 million principal on the note was due, plus interest. However, the RTC's witness admitted that he had no personal knowledge of the loans that constituted the lawsuit prior to April of 1994, and that he had no personal knowledge of how the records of the failed institution were kept by the RTC. The Consolidation Agreement were not introduced, nor did the RTC make any attempt to show that the borrower had failed to make the minimum payments referenced in the note, or even the amount of such payments, if any, that were due under the Consolidation Agreement. There was no evidence that net cash flow was available to make payments.

Unlike the other loans, the parties did not stipulate that the borrower had defaulted on the Parkway North Venture note. While the

RTC's witness testified that there had been no payments on the note, the RTC did not, in our view, establish that any payments were due under the unusual payment provision of the note.

The RTC responds that there were non-monetary defaults under the note. The note requires the maker to give notice to the lender of "any material adverse change in the financial condition or business of Maker or any Guarantor," and notice of "any default under any material agreement, contract or other instrument to which Maker or any Guarantor is a party." The RTC reasons that it showed defaults under the VCMS and Prestonwood loans, guaranteed by Miller, and that these defaults caused a material adverse change in Miller's financial condition.

We find this argument unavailing. First, under the note a change in financial condition or default under another loan is not itself a default. The note only requires notice of such events. There was no evidence that the borrower failed to provide notice.

Second, the note provides that while any event of default entitles the lender to accelerate the note, non-monetary defaults occur only after the lender has given written notice to the maker and a 30-day opportunity to cure by the maker. There was no evidence that the

lender gave notice that it considered the note to be in default by virtue of defaults on other loans or a change in Miller's financial condition. There is a demand letter in the record concerning all the guaranties. However, this letter is written to Miller, and the note requires notice of default to the maker, Parkwood North Venture. Moreover, the demand letter only claims that "there remains outstanding and unpaid amounts of principal and accrued interest." As explained above, the note distinguishes between monetary and non-monetary defaults. The latter can occur only after the lender provided written notice to the maker of a non-monetary default. There is no evidence of notice of the non-monetary defaults the RTC now claims.

Although we hold that the district court erred in awarding amounts allegedly due on the Parkway North Venture guaranty, we note that the judgment awarded separate amounts due under the Prestonwood, VCMS and Parkway North Venture guaranties. There is therefore no need to remand the case for further proceedings. Instead we modify the judgment to exclude the amount awarded on the Parkway North Venture guaranty.

AFFIRMED as MODIFIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.96-10037

IN RE: STONEHEDGE/FASA-TEXAS JDC,
LIMITED PARTNERSHIP,

Plaintiff-Appellee,

versus

VANCE C. MILLER,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas

ON PETITION FOR REHEARING

(Filed Apr. 17, 1997)

Before POLITZ, Chief Judge, REAVLEY and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RESOLUTION TRUST CORP. as Receiver for FIRST FEDERAL SAVINGS AND LOAN TEMPLE; FIRST FEDERAL SAVINGS AND LOAN - WACO; and FIRST AMERICAN FEDERAL SAVINGS BANK - FT. SMITH,	)	CIVIL ACTION NO. 3-94-CV-0912-G
Plaintiff,	)	
VS.	)	
VANCE C. MILLER,	)	
Defendant.	)	

MEMORANDUM OF DECISION

(Filed November 16, 1995)

Before: JOE A. FISH, United States District Judge

I. INTRODUCTION

The Resolution Trust Corporation ("RTC"), as receiver for

various failed financial institutions,[1] brought this action to recover on certain written guaranty agreements executed by the defendant Vance C. Miller ("Miller"). The case was tried to the court without a jury on June 7, 1995. On the basis of the evidence presented at that trial, the court has reached the following factual findings and legal conclusions.

II. PRESTONWOOD LOANS

A. Background

Prestonwood Gulf Club, Inc. ("PGC") as borrower entered into a series of loan transactions (the "Prestonwood Loans") with the RTC's predecessors in interest totaling approximately $18,000,000.00.[2] Miller executed and delivered to the respective lenders unconditional guaranty

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1 The failed financial institutions are First Federal Savings and Loan — Waco ("Waco"), First Federal Savings and Loan — Temple ("Temple"), and First American Federal Savings Bank — Ft. Smith ("Ft. Smith").

2 Plaintiff's Exhibits P8-P12 (the "PGC Notes"). PGC executed and delivered the PGC Notes and related deeds of trusts to the lenders involved. Stipulation of Facts at 1. The deeds of trust were duly recorded in the appropriate counties so as to constitute a valid lien against the Prestonwood Properties. *Id.*

agreements (the "Prestonwood Guaranties")[3] for all of the Prestonwood Loans.

All of the Prestonwood Guaranties were identical in form and contained comprehensive provisions beneficial to the RTC. One such provision states that it is the intention of the parties that Miller's obligations will not be discharged except by his performance of those obligations and then only to the extent of such performance.[4] Another provision states that Miller's obligations will not be diminished by the bankruptcy of PGC.[5] Still another provision states that PGC, as the borrower, can be released from the Prestonwood Loans without in any way affecting Miller's obligations under the Prestonwood Guaranties.[6] A further provision states that it is Miller's unambiguous and unequivocal intention that he shall remain obligated to pay the guaranteed debt regardless of any circumstances except for the full final

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3 Plaintiff's Exhibits P1-P5; Stipulations of Facts at 1.

4 Plaintiff's Exhibit P1-P5 § 1.10.

5 *Id.* Article II and § 2.03.

6 *Id.* § 2.05.

payment and satisfaction of the guaranteed debt.[7]

PGC defaulted on the Prestonwood Loans and filed a petition for relief under Chapter 11 of the Bankruptcy Code.[8] The RTC filed a proof of claim in the amount of $18,903,059.46 in the PGC bankruptcy proceeding.[9] PGC did not file an objection to the RTC's claim.[10] Miller was not scheduled as a creditor in the PGC bankruptcy proceeding, but he fully participated in it by virtue of his ownership interest in PGC, Parkway North Venture, and VCMI.[11]

The PGC bankruptcy was resolved by a consensual plan of reorganization (the "Plan"). The Plan provided, in pertinent part, that:

1. The RTC's claim (in the amount of $18,903,059.46) would be deemed to be an allowed claim;

2. The RTC's claim would be bifurcated into a secured claim of approximately $10,000,000 and an unsecured claim of approximately $8,900,000;

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7 *Id.* § 2.13.

8 Stipulations of Fact at 1.

9 *Id.* at 2.

10 *Id.*

11 Parkway North Venture and VCMI were non-debtor parties to the PGC bankruptcy. Plaintiff's Exhibit P6 ¶ 5.7.1.

3. The secured portion of the RTC's claim would be dealt with by PGC's issuance of a new note in the approximately amount of $10,000,000 secured by a new deed of trust on PGC's real property;

4. The unsecured portion of the RTC's claim of approximately $8,900,000 would be "satisfied in full by a payment in cash of 7 ½% of the Allowed . . . Claim";

5. Any unpaid amount would be discharged;

6. The Plan would "constitute a novation of any debt of whatever character against the *Debtor* [i.e., PGC]."[12]

The Plan made no reference to Miller's guaranty obligations.

A hearing was held on April 9, 1992 by the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, to determine whether the Plan should be confirmed. Although the RTC had originally objected to the Plan, that objection was withdrawn.[13] Instead, the RTC filed a ballot with the bankruptcy court accepting and voting in favor of the Plan.[14] Moreover, the RTC agreed to the entry of an order confirming the Plan.[15] As a result of these developments, the

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12 Plaintiff's Exhibit P6 ¶¶ 3.1, 4.3, 4.4, 4.5, 5.3, 5.4, 5.5, 8.1 (emphasis added).

13 Stipulations of Facts at 2.

14 *Id.*

15 *Id.*

bankruptcy court entered an order confirming the Plan.[16]

Following confirmation of the Plan, a new promissory note (the "New Promissory Note") was prepared, which Miller executed on behalf of PGC.[17] Pursuant to paragraph 9 thereof, the New Promissory Note - - together with a related deed of trust and other instruments, as well as $667,729.45 in cash delivered contemporaneously to the RTC - - were "given *in novation and extinguishment of the obligations of PGC, Inc., a Texas non-profit corporation ("Debtor") to the RTC*, including and without limitation, the following . . .."[18] In the five paragraphs that followed, each of the five PGC Notes, i.e., the notes evidencing the Prestonwood Loans, was identified specifically.[19] These five PGC Notes comprise the entire basis for the RTC's claim in this case based on the Prestonwood Loans.[20]

Before funding the $667,729.45 in cash and delivering the New

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16 *Id.*

17 *Id.*

18 *Id.* at 2-3; Defendant's Exhibit D5 ¶ 9 (emphasis added).

19 *Id.* at 3.

20 *Id.*

Promissory Note and its related deed of trust and other instruments, Miller requested written affirmation from the RTC that it was accepting the terms of the New Promissory Note.[21] On June 8, 1992, an attorney for the RTC sent a letter to PGC's attorney stating that "[m]y client [the RTC] and I have reviewed and found all five documents to be acceptable in their present form."[22]

The New Promissory Note and its related deed of trust and other documents was thereafter executed and delivered to the RTC. Additionally, a cash payment in the amount of $917,729.45 were made to the RTC.[23] On June 17, 1992, the RTC acknowledged, through its counsel, receipt of the New Promissory Note and the cash payment in the amount of $917,729.45.[24]

Miller has made no payments to the RTC under the Prestonwood Guaranties.[25] By letter dated January 18, 1995, the RTC

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21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*; Defendant's Exhibit D27.

25 Testimony of Steven Sheffield at trial.

made demand on Miller for payment, under these guaranties, of the balance remaining on the PGC Notes.[26]

The RTC is the owner and holder of the PGC Notes and the related deeds of trust and guaranties.[27] The PGC Notes and the Prestonwood Guaranties provide for the payment of reasonable attorney's fees and costs incurred by the RTC in its efforts to collect this indebtedness.[28]

Part of the RTC's claim (i.e., the sum of $4,235,330.01) was discharged in the PGC bankruptcy. As of June 2, 1995, the PGC notes had an unpaid balance of $10,459,536.83.[29]

B. Analysis

The claims asserted by the RTC and the PGC bankruptcy were allowed claims because no objections to such claims were timely filed.[30]

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26 *Id.*; Plaintiff's Exhibit P33.

27 Stipulations of Facts at 3.

28 Plaintiff's Exhibit P1-P5 § 1.09; Plaintiff's Exhibits P8-P10 § 12, P11-P12 § 11.

29 Plaintiff's Exhibit P34.

30 The Plan provides that any claim for which a proof of claim has been filed prior to the bar date, or which is scheduled and not listed as disputed, contingent or unliquidated and to which no objection has been timely

See 11 U.S.C. § 502(a). The Plan bifurcated the RTC's claim into *first*, a secured claim, by providing for the execution and delivery of a new note and deed of trust in an amount equal to the value of the collateral, less a $750,000 cash payment, and *second*, an unsecured claim in the approximately amount of $8,000,000, by providing that PGC as the debtor would make a cash payment of 7 ½% of this unsecured amount. *See* 11 U.S.C. § 506(a). The remaining 92 ½% of the unsecured amount was to be discharged. *See* 11 U.S.C. § 1141 (d)(1)(A).

Miller contends that the indebtedness arising from the Prestonwood Loans was extinguished by novation.[31] A novation is "the creation of a new contract in place of the old one." *Crook v. Zorn*, 95 F.2d 782, 783 (5th Cir. 1938). "The elements of a novation are (1) a previous, valid obligation; (2) an agreement of the parties to a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract." *Federal Deposit Insurance Corporation v. Waggoner*, 999 F.2d 826, 829 (5th Cir. 1993).

A discharge in bankruptcy "operates as an injunction against the

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filed, is an allowed claim. Plaintiff's Exhibit P6 § 1.4.

31 Joint Pretrial Order filed June 6, 1995 at 14 ¶ A(1).

commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A discharge in bankruptcy does not, however, affect the liability of any other entity on, or the property of any other entity for, such debt. 11 U.S.C. § 524(e); *see also NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1266 (5th Cir. 1994); *Matter of Sandy Ridge Development Corporation*, 881 F.2d 1346, 1351 (5th Cir. 1989); *United States v. Stribling Flying Service, Inc.*, 734 F.2d 221, 223 (5th Cir. 1984).

The obligations of a non-debtor guarantor may be discharged in a Chapter 11 plan of reorganization if the plan of reorganization specifically provides for and disclosure of such discharge is made. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051-52 (5th Cir. 1987). On the other hand, if the plan has no express provisions for the release of a non-debtor guarantor, then "[a] discharge in bankruptcy will simply not affect the liability of a guarantor" such as Miller. *Matter of Sandy Ridge Development Corporation, above, 881 F.2d at 1350-51.*

"One of the primary purposes for obtaining a guarantor to a note is to provide an alternative source of repayment in the event that the

principal obligor's debt is discharged in bankruptcy." *R.I.D.C. Industrial Development Fund v. Snyder*, 539 F.2d 487, 491 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977).

The court will enforce the guaranty according to its terms if the terms are unambiguous. *Federal Deposit Insurance Corporation v. Nobles*, 901 F.2d 477, 480 (5th Cir. 1990).

A plan of reorganization is binding upon a party to that plan. 11 U.S.C. § 1141(a).

C. Conclusion

Miller, as guarantor of the PGC's Notes, is liable to the RTC on the Prestonwood Guaranties. He is also liable to the RTC for its reasonable attorneys' fees and costs.

III. PARKWAY NORTH VENTURE LOANS

A. Background

On June 30, 1989, Parkway North Venture executed a promissory note (the "Parkway North Venture Note") in the original principal amount of $2,000,000 payable to the RTC's predecessors in

interest.[32] On that same date, Miller executed and delivered an unconditional guaranty agreement guaranteeing the Parkway North Venture Note.[33]

The RTC is now the owner and holder of the Parkway North Venture Note and Guaranty.[34] The Parkway North Venture Note has not been paid by the maker thereof, and Miller has not paid the Parkway North Venture Note under the terms of the Parkway North Venture Guaranty.[35] By letter dated January 18, 1995, the RTC made demand on Miller for payment, under this guaranty, of the balance remaining on the Parkway North Venture Note.[36]

The Parkway North Venture Note and the Parkway North Venture Guaranty provide for the payment of reasonable attorney's fees and costs incurred by the RTC in its effort to collect the amount due on

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32 Stipulations of Facts at 4; Plaintiff's Exhibit 14.

33 Stipulations of Facts at 4; Plaintiff's Exhibit P15.

34 Stipulations of Facts at 4.

35 Testimony of Steven Sheffield at trial.

36 Plaintiff's Exhibit P33.

this indebtedness.[37]

As of June 2, 1995, the Parkway North Venture Note had an unpaid balance of $2,947,555.56.[38]

B. Analysis

The court will enforce the guaranty according to its terms if the terms are unambiguous. *Nobles*, above, 901 F.2d at 480.

C. Conclusion

Miller, as guarantor of the Parkway North Venture's Note, is liable to the RTC on the Parkway North Venture Guaranty. He is also liable to the RTC for its reasonable attorney's fees and costs.

IV. VCMS LOANS

A. Background

On February 12, 1985, VMCI Corporation executed the February VCMS Note[39] payable to Texas State Mortgages, Inc. in the

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37 Plaintiff's Exhibit P14 ¶ 11; Plaintiff's Exhibit P15 § 1.09.

38 Plaintiff's Exhibit P34.

39 Stipulations of Facts at 4; Plaintiff's Exhibit P20.

original principal amount of $2,932,000. The February VCMS Note was secured by a deed of trust on real estate located in Denton County, Texas. On the same date, the February VCMS Note and deed of trust were assigned to Waco, one of the RTC's predecessors in interest, by Texas State Mortgages, Inc.[40]

On July 24, 1985, VCMS Investments executed the July VCMS Note[41] payable to Texas State Mortgages, Inc. in the original principal amount of $825,000. The July VCMS Note was secured by a deed of trust covering real property in Travis County, Texas. On the same date, the July VCMS Note and deed of trust were assigned to Waco by Texas State Mortgages, Inc.[42]

On August 22, 1985, VCMS Investments executed the August VCMS Note[43] payable to Texas State Mortgages, Inc. in the original principal amount of $4,300,000. The August VCMS Note was secured by a deed of trust covering real property located in Travis County,

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40 Stipulations of Facts at 4.

41 *Id.*; Plaintiff's Exhibit P21.

42 Stipulations of Facts at 4.

43 *Id.*; Plaintiff's Exhibit P22.

Texas. On the same date, the August VCMS Note and deed of trust were assigned to Waco by Texas State Mortgages, Inc.[44]

On November 4, 1986, VCMS Investments executed the November VCMS Note[45] payable to Texas State Mortgages, Inc. in the original principal amount of $232,500. The November VCMS Note was secured by a deed of trust covering real property located in Travis County, Texas. On the same date, Texas State Mortgages, Inc. assigned the November VCMS Note and deed of trust to Waco.[46]

At the time each of these VCMS Notes were executed, Miller signed and delivered guaranties (the "VCMS Guaranties") covering the obligations represented by those notes.[47] VCMS defaulted on the payment of these notes.[48]

On April 2, 1991, the RTC foreclosed its security interest under

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44 Stipulations of Facts at 4-5.

45 *Id.* at 5; Plaintiff's Exhibit P23.

46 Stipulations of Facts at 5.

47 *Id.*; Plaintiff's Exhibits P16-P19.

48 Stipulations of Facts at 5.

the various VCMS deeds of trust.[49] The RTC bid $2,600,499.90 at the April 2, 1991 foreclosure, an amount less than the total owed on the VCMS Notes.[50]

The RTC is the owner and holder of the VCMS Notes and Guaranties.[51] It commenced this action against Miller on May 17, 1994, more than two years after the April 2, 1991 foreclosure of the liens created by the VCMS deeds of trust.[52]

After crediting the amounts bid by the RTC at the VCMS foreclosures, the VCMS Notes had an unpaid balance of $13,228,650.32 as of June 2, 1995.[53] By letter dated January 18, 1995, the RTC made demand on Miller for payment, under the VCMS Guaranties, of the balance remaining on the VCMS Notes.[54]

The VCMS Notes and the VCMS Guaranties provide for the

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49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 Plaintiff's Exhibit P34.

54 Plaintiff's Exhibit P33.

payment of reasonable attorney's fees and costs incurred by the RTC in its efforts to collect the amount due on this indebtedness.[55]

B. Analysis

Miller maintains that the RTC's claims on the VMS Loans have been extinguished because a suit for a deficiency must be brought, under Texas law, within two years of the foreclosure sale.[56] The RTC's claims on the VCMS Loans, however, are contractual claims against Miller based on the VCMS Guaranties. Therefore, this suit against Miller is not an action for a deficiency balance arising from foreclosure under a deed of trust securing a note. Rather, the foreclosures and application of foreclosure proceeds merely liquidated the RTC's damages claim against Miller on the VCMS Guaranties.

Texas Property Code § 51.003(a), which is the statute of limitations rather than a statute of repose,[57] does not apply to this

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55 Plaintiff's Exhibits P20 at 2 (last paragraph), P21 at 2 (next to last paragraph), P22 at 2-3, P23 at 2 (next to last paragraph), P16-P19 ¶¶ 2, 17.

56 Joint Pretrial Order filed June 6, 1995 at 15-16.

57 Statutes of repose limit potential liability by limiting the time within which a cause of action can arise. *Kline v. J.I. Case Company*, 520 F. Supp. 564, 566 (N.D. Ill. 1981). Because they extinguish a right of

action. A "'statute of repose' refers to a distinct type of statute that cuts off a right of action *before* it accrues." *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654 n.1 (Tex. 1989) (emphasis added). Because a suit on a deficiency can only be commenced after the accrual of a cause of action, *viz.*, default on a debt, any time limit on the commencement of a deficiency suit must necessarily be a statute of limitation as opposed to a statute of repose.

The VCMS Guaranties specifically waived diligence in the collection of any of the guaranteed indebtedness in preserving the liability of any person on the indebtedness or in bringing suit to enforce collection of the guaranteed indebtedness.[58]

By the terms of the VCMS Guaranties, the RTC is permitted, without impairing or diminishing the obligations of Miller as guarantor, to elect to pursue any available remedy against the debtor or against any

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action after a specified time regardless of the time of accrual of the cause of action or of the invasion of legal rights, BLACK'S LAW DICTIONARY 1441 (6th ed. 1990), they are distinguishable from statutes of limitations, which limit to a period commencing with the accrual of a cause of action the time within which a legal action may be brought.

58 Plaintiff's Exhibit P16-P19 ¶ 2.

security held by the debtor.[59] The RTC is not required by the VCMS Guaranties to exercise any of its remedies against VCMS. Any references to the foreclosure of the indebtedness held by the RTC is only a reference to that action taken to arrive at the amount of liquidated damages for which the RTC is suing Miller.[60]

Section 51.003(a) is not a statute of extinguishment which extinguishes the right to collect. It in no way extinguishes the obligations of the debtor but instead limits the time for pursing a remedy, including a deficiency judgment, against a debtor.

The Texas Legislature has recognized a distinction between a deficiency suit against a debtor and a suit against a guarantor which results in a deficiency. The former is the subject of Texas Property Code § 51.003(a) (Vernon 1995), while the latter is the subject of a separate procedure in Texas Property Code § 51.005 (Vernon 1995).

A federal statute of limitation preempts a state extinguishment statute. *United States v. Summerlin*, 310 U.S. 414, 416 (1940). Assuming *arguendo* that § 51.003(a) is a statute of limitations, the six

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59 *Id.* ¶ 6.

60 *Id.*

year limitation period set out in 12 U.S.C. § 1821(d)(14) applies and preempts the two year period provided in § 51.003.

The policy behind the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as amended, favors application of the six year limitation period. *Federal Deposit Insurance Corporation v. Hinkson*, 848 F.2d 432, 434 (3rd Cir. 1988). The federal statute of limitations preempts a state statute of limitations after the claim comes within the control of the federal government. *Id.* FIRREA also preempts federal common law. *Resolution Trust Corporation v. Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994).

The federal statute of limitations has not run in this case. The time within which the RTC may bring a civil action on contract claims is the longer of a six year period from the date the claim accrues or the period applicable under state law. A claim accrues on the later of: (I) the date the RTC is appointed conservator or receiver, or (ii) the date on which the cause of action accures.[61]

An action to recover a deficiency on a foreclosed note accrues which the maker of the note defaults. *McLemore v. Pacific Southwest*

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[61] 12 U.S.C. § 1821(d)(14).

Bank, FSB, 872 S.W.2d 286, 292 (Tex.App.--Texarkana 1994, writ dism'd by agr.).

The federal statute of limitations applies to nonjudicial foreclosures conducted by the FDIC as receiver or conservator. *William C. Davidson, P.C. v. Mills*, 821 F.Supp. 1176, 1179 (W.D. Tex. 1993), *aff'd*, 44 F.3d 246 (5th Cir. 1995).

Under the supremacy clause of the United States Constitution, state law is preempted to the extent it actually conflicts with federal law. Conflict preemption can arise when "compliance with both federal and state [law] is a physical impossibility." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Conflict preemption results when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

C. Conclusion

Miller, as guarantor of the VCMS Notes, is liable to the RTC on the VCMS Guaranties. He is also liable to the RTC for its reasonable attorneys' fees and costs.

V. SUMMARY

For the reasons stated above, Miller is liable to the RTC as guarantor of the Prestonwood, Parkway North, and VCMS Notes in the total amount of $26,635,742.71 plus reasonable attorneys' fees and costs incurred by the RTC in prosecuting this action.

Within fifteen days of this date, counsel for the RTC is ORDERED to submit a proposed form of judgment consistent with this memorandum of decision.

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11 U.S.C. § 524(a)

A discharge in a case under this title --

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharged of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1) or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. §524(e)

Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. § 524(e)

12 U.S.C. § 1821(d)(14)

(A) **In General**
Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be --

(i) in the case of any contract claim, the longer of

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law . . . .

(B) **Determination of the date on which a claim accrues**
For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such paragraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14)

Texas Property Code, § 51.003

(a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a

deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

(b) Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property to arrive at a current fair market value.

(c) If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.

Texas Property Code, § 51.003

TEX. CIV. PRAC. & REM. CODE § 16.008

(a) A person must bring suit for damages for a claim listed in Subsection (b) against a registered or licensed architect or engineer in this state, who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.

(b) This section applies to suit for:

(1) injury, damage, or loss to real or personal property;
(2) personal injury;
(3) wrongful death;
(4) contribution; or
(5) indemnity.

(c) If the claimant presents a written claim for damages, contribution, or indemnity to the architect or engineer within the 10-year limitation period, the period is extended for two years from the day the claim is presented.

Tex. Civ. Prac. & Rem. Code § 16.008